

The Cramdown

Tampa Bay Bankruptcy Bar Newsletter

Fall 2001

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The President's Message

By Zala L. Forizs



Abraham Lincoln said that a lawyer's time is his stock and trade. As we are in some sense merchants, this is a true statement. But lawyers provide content with their time.

This content consists of many things, including an understanding of laws, ideas, concepts, and strategies to deal with conflict and to facilitate cooperative efforts. So we also are craftsmen, and words are our tools.

Each craft has its special tools and artisans develop an appreciation, almost a reverence for their tools, which over time and with repeated use become a natural extension of their minds and hands. Cooks favor certain knives, artists certain brushes, and carpenters certain saws, routers and hammers which make their work flow from conception to execution with relative ease. Good tools create shortcuts, but they actually enhance quality.

The specialized words which bankruptcy lawyers use promote

efficiency. Our discourse in legal arguments would be insufferably protracted if we did not use single words or short phrases as shorthand for complex ideas. When we use the terms, "cram down," "strong-arm powers," "executory contracts," and "bankruptcy estate," we shorten and focus our communications with courts and fellow practitioners. We also make ourselves unintelligible to the untrained, which is not without some guilty pleasures.

Of course, we are similarly left in the outskirts of other communities defined by their own argot. A bankruptcy practice can encompass almost any legal or social issue which requires us to learn about other disciplines. We deal with police power/criminal issues (automatic stay), environmental laws (discharge/automatic stay), domestic relations law (discharge), business and asset valuation (confirmation, cram-down, adequate protection, 1111(b) election). Therefore, we must learn the specialized language of many other disciplines.

One of the first reported cases that ever dealt with AIDS arose from a contested motion which I filed on behalf of a Chapter 11 Trustee to assume an executory contract which the debtor had

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The Cramdown can be accessed via the internet at www.flmb.uscourts.gov

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with the Florida Department of Corrections to collect blood plasma from Florida inmates. The plasma was used for resale to hospitals and to extract interferon for use in experimental testing to determine its efficacy in the treatment of multiple sclerosis. The Department of Corrections opposed the motion on the grounds that the use of plasma from prison inmates might spread this dreaded new disease. At the time, it was not known that AIDS was caused by a virus which could be killed by the heat and alcohol treatments which my client applied to the plasma and which killed all known viruses. In the proceeding, we argued bankruptcy law (assumption of an executory contract), biochemistry (the likelihood that AIDS was caused by a virus and that all known viruses were killed by the treatments used), and broad public policy balancing of interests (the risk of the spread of a dreaded disease versus the need for a steady supply of blood plasma for regular treatment and research uses).

It is hard to imagine a more challenging, exciting, timely and varied law practice, or other calling for that matter, than bankruptcy law. We have our own community of practitioners held together by our own lingo. But, we are also called upon to be translators among a multitude of other specialized language speakers.

The Tampa Bay Bankruptcy Bar Association is the place where bankruptcy lawyers who practice in the Tampa division can make friends among fellow practitioners, get to know our judges and court staff and experience both a collegial and cutting edge law practice. Membership in our Association helps us to experience the gratifying comfort of using the tools of our profession within a close community of practitioners. And we speak each other's language. Ya know wut I mean?

If you somehow read this article but are not a member of this Association, stop what you are doing. Call me at (813) 289-0700. If I cannot convince you to join our Association, I will buy you lunch (at our next monthly CLE luncheon of course). Assuming you are an existing member and you want to really take advantage of what our Association offers, call me at the same number. We can use your talents on one of our activities committees. I promise you that the time you invest will be richly rewarded in friends made and things learned. All that for \$60.00 a year, a fraction of the value of one hour of your time. Abe Lincoln would approve.



What Do 3,300 Attorneys Have in Common?

The Hillsborough County Bar Association

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The Unveiling of Judge Paskay's Portrait

By Harley E. Riedel

It was with some trepidation that I accepted Ed Whitson's invitation to write a column commemorating the unveiling of Chief Judge Emeritus Alexander L. Paskay's portrait in his courtroom on the ninth floor of the Sam M. Gibbons Federal Courthouse. After all, what can one really say about a judge who has been sitting on the bench since July 1, 1963, has authored more than 2,000 published decisions, has presided over more than 50,000 cases in Tampa, Fort Myers, and Orlando (including mega-cases like Hillsborough Holdings), has organized and hosted the Stetson Bankruptcy Seminar for more than 20 years, has often testified before Congress on bankruptcy legislation, and has authored or co-authored a number of treatises on bankruptcy law?

Perhaps the most that I can do is to offer a little historical perspective. When I began practice in 1974, the entire federal bench in Tampa consisted of District Judge Ben Krentzman, District Judge William Terrell Hodges, and Judge Paskay. By the time I began practicing, Judge Paskay had already served for 11 years, and he would continue to be the only bankruptcy judge in Tampa until Judge Thomas Baynes' appointment 13 years later in 1987.

In 1974, the Bankruptcy Court was tucked away in a corner of the fourth floor of the old Federal Courthouse. Judge Paskay still presided over first meetings of creditors that we now refer to as "Section 341 meetings," and bankruptcy cases still went by Roman numerals under the Bankruptcy Act.

I remember defending an appeal before Judge Krentzman of a decision written by Judge Paskay in the late 1970s. After attentively listening to oral argument, Judge Krentzman turned to the appellant's counsel and said, "You know, I have heard dozens of appeals from Judge Paskay's decisions. I am convinced that Judge Paskay carefully weighs the facts and the law before he writes an opinion, but that he becomes -- as a judge should -- an advocate of his position after he has made up his mind. I always pay close attention to the briefs and the arguments, but I have never had occasion to reverse one of his decisions." Thankfully for me, as counsel for the appellee, Judge Krentzman did not make *my* case his first reversal.



Even more than his legal reasoning and logic and knowledge of the law, however, the hallmark of Judge Paskay's judicial approvals is his common sense and nose for the truth and practical reality. Bankruptcy courts are business courts. Bankruptcy cases mirror the economy. Difficult decisions often must be made quickly, and practicalities may require the tailoring of specific judicial relief to suit the circumstances. Congress and case law have given bankruptcy judges wide discretion in many of these areas, and yet the exercise of this discretion may have extraordinarily far-reaching consequences on the lives of thousands of employees and creditors.

Few of these discretionary decisions are published, yet virtually every bankruptcy lawyer with whom I have spoken – creditor or debtor – is quick to acknowledge Judge Paskay's uncanny ability to reach the "right" result in these decisions. One prominent lawyer who primarily represents creditors told me, "Even when Judge Paskay has ruled against me over the years, I have generally thought that he was right. He gives debtors a chance, but he also knows when his decisions really affect and harm creditors."

One mistake that you should not make is to

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Calendar of Events

Date	Event	Time	Location
October 17-21	National Conference of Bankruptcy Judges		Orlando
October 31	View From The Bench Reception		
November 1	View From The Bench Seminar	8:30 a.m.	Tampa
November 12	UCC Revised Article 9 Seminar – Professor Ray Warner	Noon	Hyatt Regency, Tampa
November 12	Tampa Bay Bar Association Meeting		
November 29	Bankruptcy Law Primer For Paralegals		Sheraton Sand Key Resort, Clearwater Beach
November 30-December 1	Stetson University's Annual Seminar on Bankruptcy Law and Practice		Sheraton Sand Key Resort, Clearwater Beach
December (?)	Soldiers & Sailors Relief Act (tentative)	[TBA]	[TBA]
December 13	Holiday Program	Evening	Hyatt Regency, Tampa
January 8, 2002	Federal Appellate Program (tentative)		Hyatt Regency, Tampa
February 12, 2002	Consumer Bankruptcy Panel—Valuation of Secured Claims		Hyatt Regency, Tampa
March 12, 2002	Litigation Tips—Judge Corcoran and Panel	[TBA]	Hyatt Regency, Tampa
April 9, 2002	Chapter 13 Seminar (1/2 day) Terry Smith, Chapter 13 Trustee	[TBA]	Hyatt Regency, Tampa
May 14, 2002	Bankruptcy Law Update	[TBA]	Hyatt Regency, Tampa
June, 2002	Annual Dinner	[TBA]	Hyatt Regency, Tampa

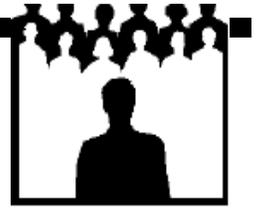
CLE COMMITTEE NEEDS YOU!

The CLE Committee could use your help with our monthly meetings and CLE programs. We also need to help the annual dinner and its theme. Please call Ed Rice (229-3333) or David Tong (224-9000) today to get involved.



There will be a reception at the Tampa Club in conjunction with the Annual View from the Bench Seminar the evening of October 31, 2001 from 5:30 p.m. until 7:30 p.m. During the reception, a special award will be presented to David K. Oliveria, Clerk of the Court for the U.S. Bankruptcy Court, Middle District of Florida. The reception is free to those who have registered for the November 1st View from the Bench Seminar.

If you would like to attend the reception but have not registered for the View From The Bench, the cost is \$17.00 for current Tampa Bay Bankruptcy Bar Association members and \$22.00 for non-members. Please contact Pat Tracey at (813) 223-7474 if you would like to attend the reception.



View From The Bench

By The Honorable C. Timothy Corcoran, III

THE BASICS OF BANKRUPTCY SALES

I've noticed a good deal of confusion recently concerning bankruptcy sales. Lawyers often ask for one kind of sale when they really want something else. Sometimes they aren't sure how to get the kind of sale they want. I thought it might be useful, therefore, to review some of the basics of bankruptcy sales.

In general, there are three kinds of sales that occur in bankruptcy cases: (1) sales subject to liens; (2) "pay off" sales in which liens and encumbrances are paid and satisfied from the sales proceeds; and (3) sales free and clear of liens. Although each of these sales is governed by Section 363 of the Bankruptcy Code, each is very different in terms of the relief each provides and the noticing and due process considerations that apply.

1. Sales subject to liens.

Chapter 7 trustees typically sell property of the estate "as is, where is" without representations or warranties. Thus, a buyer at such a sale bears all the risks that there are liens and encumbrances that come with the property sold. Although a buyer can guard against this risk by performing "due diligence," such as by searching the public records and the records of the Secretary of State, the buyer obtains only whatever interest the estate has -- wants and all. If there are liens and encumbrances, the buyer is responsible for satisfying them to clear the title to the purchased property.

Under F.R.B.P. 6004(a) and (b) and L.B.R. 6004-1, the trustee may sell property subject to liens after giving notice to all creditors of the intention to do so. Under F.R.B.P. 6004(d) and L.B.R. 6004-1, the trustee may give a single, general notice when selling all of the nonexempt property of the estate for an aggregate gross value less than \$2,500. If no party in interest files an objection within 20 days, the trustee completes the sale without the necessity of an order. If a party in interest files an objection, the court hears the objection and enters an appropriate order.

Experience teaches that the vast majority of noticed sales subject to liens do not trigger objections. When objections are filed, the objections typically go to the sufficiency of the consideration to be received.

Sales subject to liens are therefore the simplest kind of bankruptcy sale and the simplest to conduct.

2. "Pay off" sales.

A Chapter 7 trustee or a Chapter 11 or Chapter 13 debtor may wish to sell property of the estate and pay liens and encumbrances of record from the sales proceeds. These liens and encumbrances may be mortgage liens, Article 9 security interests, or tax liens. A "pay off" sale, therefore, is a sale at which liens and encumbrances and the necessary costs and expenses of sale ordinarily paid by a seller are paid and satisfied from the sales proceeds.

This kind of sale has many advantages. In addition to liquidating the asset, it also pays off the secured creditors, thereby avoiding the continued accrual of interest when the creditors are oversecured. It also brings clear title to the buyer because the liens and encumbrances are paid off at closing. In that sense, the "pay off" sale resembles the classic non-bankruptcy real estate closing. The title company insures the title because the liens and encumbrances of record are paid and satisfied, not because of any cleansing of the title through bankruptcy.

"Pay off" sales require court authorization. Arguably a Chapter 7 trustee could sell using the L.B.R. 6004-1 notice of intent to sell procedure, but the trustee needs an order to authorize the disbursements to pay off the liens. As a practical matter, therefore, the Chapter 7 trustee must have an order to close the transaction. L.B.R. 6004-1 does not apply to Chapter 11 and 13 debtors so they need an order of the court in all events.

Trustees and Chapter 11 and 13 debtors obtain "pay off" sale orders upon motion and hearing. F.R.B.P. 2002(a)(2) requires 20 days notice to all creditors of such a hearing. Because F.R.B.P. 2002(c)(1) requires that creditors also be noticed of sale details, better practice suggests that the moving party serve the sale motion, which must contain these details, on all creditors. The L.B.R. 2004-4 negative notice procedure is also available

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Recent Case Law Update

By Donald R. Kirk

The Clerk's Corner

By Charles Kilcoyne

Given the large number of daily filings and to limit customer waiting time to a reasonable length, the Clerk's office has implemented an alternative system of receiving and receipting for filings.

Those individuals filing documents with the Court who wish to receive an immediate return copy and receipt will be required to wait at the cashier window until the process can be completed. Those not wishing to wait can use the alternative "drop box" now available, by placing the filing in the envelope provided and depositing it in the drop box. If a returned copy or receipt is requested, a self-addressed stamped envelope should be included with the filing.

This change was brought about by a financial audit performed by the Administrative Office of U.S. Courts, which required the Clerk's office to implement a procedure to ensure that a receipt is prepared for each collection at the time it is received. We are installing a third cash register in the very near future which will enable the intake staff to more promptly issue a receipt to those who want to wait and receive a filed stamped copy of a petition. Otherwise, by placing the petition, motion to lift stay or adversary complaint in the drop box, the filing will be handled as if it were mailed to the clerk's office.

In In re Cone Constructors, Inc., 265 B.R. 302 (Bankr. M.D. Fla. 2001), Judge Glenn held that a surety company's rights to construction contract balances due to the surety's principal (a Chapter 7 debtor) were superior to the rights of the Chapter 7 Trustee. The surety issued payment and performance bonds to the Debtor for various construction projects. The Debtor defaulted on the contracts prepetition, thereby obligating the surety to perform on the bonds. The Debtor filed a Chapter 11 bankruptcy case, which subsequently converted to a Chapter 7 case. The surety paid approximately \$1.7 million to bond claimants. The construction project owner held contract balances in the amount of approximately \$665,000.00 with respect to the bonded projects. The surety sought stay relief to pursue its rights to these contract balances.

Judge Glenn held that the surety possessed the right of equitable subrogation with respect to any contract balances due on bonded projects wherein the debtor defaulted prepetition and the surety performed its bond obligations. Judge Glenn noted that "the 'majority of bankruptcy courts . . . have concluded that retainage is not property of the debtor - contractor's estate where there has been a pre-petition default and a surety has stepped in under its bond.'" Id. at 308. Based on this reasoning, Judge Glenn granted the surety stay relief to pursue the contract balances.

Do you have a comment, idea or suggestion that you would like to share about The Cramdown?

Do you have an article that would be of interest to our members?

If so, please contact Ed Whitson or Donald Kirk.

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in lieu of an actual hearing if no objections are filed.

Experience teaches that "pay off" sales rarely trigger objection. When objections do arise, they typically involved the sufficiency of the consideration to be received. In the context of a Chapter 13 case, the net proceeds of the sale of exempt property typically goes to the debtor; the net proceeds of the sale of non-exempt property typically goes to the Chapter 13 trustee. In the context of a Chapter 7 or Chapter 11 case, a broker's commission cannot be paid from the closing proceeds until orders authorizing the employment of the broker and authorizing the broker's compensation and payment are entered.

In substance and procedure, "pay off" sales are more complicated than sales subject to liens, but they are still fairly simple because they are not much different from ordinary sales outside bankruptcy.

3. Sales free and clear of liens.

Sales free and clear of liens are the kind of sales that can occur only in the bankruptcy context. In this sale, the property passes to the buyer free and clear of liens, thereby cleansing the buyer's title to the property by order of court. The liens are not paid off. Instead, they attach to the proceeds of the sale. Ultimately -- but typically *after* the sale -- the court orders the distribution of the sale proceeds to the lienholders in accordance with their respective interests and priorities, perhaps after litigation to establish those interests and priorities. Thus, sales free and clear are most useful when the trustee or Chapter 11 or 13 debtor wants to sell the asset now and fight about entitlement to the proceeds later.

Section 363(f) of the Bankruptcy Code and F.R.B.P. 6004(c) govern sales free and clear of liens. Notably, the circumstances in which the court can order such a sale are narrowly prescribed. First, the trustee or the Chapter 11 or 13 debtor must file a motion under F.R.B.P. 9014. F.R.B.P. 6004(c) requires that the motion "shall be served on the parties who have liens or other interests in the property to be sold." The motion is also best served on all creditors because detailed 20-days notice to all creditors is required by F.R.B.P. 2002(a)(2) and (c)(1). Also note that L.B.R. 2002-4(a)(3) specifically provides that the negative notice procedure is *not* available to substitute for an actual hearing in the case of a motion to sell free and clear of liens unless the presiding judge permits it under L.B.R. 2002-4(a)(6).

Second, the movant must allege and prove at the hearing at least one of the Section 363(f) narrow statutory grounds for such a sale. Those grounds are:

(1) applicable nonbankruptcy law permits sale of the property free and clear of the lien or interest;

(2) the holder of the lien or interest consents;

(3) if the interest is a lien, the price at which the property is to be sold is greater than the aggregate value of all the liens on the property;

(4) the lien or interest is in bona fide dispute;

or

(5) the holder of the interest could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of the interest.

In dealing with each of these grounds, the first thing to note is that the lien or interest free of which the property is to be sold must be identified. The court *cannot* authorize a sale free and clear on an *unidentified* lien or interest. Fundamental due process notions underlie specific provisions of the Code and the Rules that allow the court to affect a lien or interest *only* after the holder is first noticed and joined in the contested matter.

The three easy grounds to prove at the hearing are obvious. Present the lienholders consent. If you cannot do that, show that there is a bona fide dispute as to the lien or interest. If you cannot do that, show that the sales price will bring enough to pay all liens. If you cannot establish one of these three easy grounds, your options are limited. Typically these motions fail when the sales price is insufficient to pay all liens of record unless all the lienholders consent.

Also keep in mind that, in some limited circumstances, substantive non-bankruptcy law can impose successor liability for claims notwithstanding a bankruptcy court order approving a sale free and clear of liens.

Conclusion.

Bankruptcy sales can be complicated, but they don't need to be. When you're confronted with the need for a sale, keep these basic concepts in mind. When you do so, you'll easily recognize the kind of sale you want. Then you'll have no trouble filing the necessary papers, giving the required notice, and getting your desired order.





SIX TIPS FOR APPEARING BEFORE BANKRUPTCY JUDGES & TRUSTEES

By Luis M. Martinez-Monfort

As a young lawyer in private practice you don't have the luxury of only working on cases you find interesting or that pertain specifically to your field of practice. Most likely, you only specialize in responses like, "No, I don't have anything better to do this weekend than review discovery documents in a cramped and dirty warehouse with poor circulation." Against this backdrop, you may find yourself one day appearing before a bankruptcy judge or panel trustee. Because most of us avoided the bankruptcy elective in law school like the plague, here are a few simple tips that might make the whole experience less stressful:

1. Know the law. Bankruptcy law is statutory. The best way to prepare for a hearing on any matter in bankruptcy court is to first make sure that you know and understand the section of the Bankruptcy Code at issue in your matter. Be prepared to answer the judge's questions regarding what section of the code you're relying on for your requested relief.

2. Know the facts of your case. Most associates' first experience with bankruptcy court involves standard motions on issues of law that the court deals with every day (e.g., motions for relief from the automatic stay or motions to value collateral). Bankruptcy judges are more interested in hearing counsel explain the specific facts of their client's case than hearing the public policy reasons and congressional intent behind a particular section of the Code.

3. Know the local rules of the bankruptcy court. Each bankruptcy court for each district most likely will have its own set of local rules that can be downloaded from the district's website. These rules dictate the manner in which parties should comply with the Federal Rules of Bankruptcy Procedure for that district.

4. Research the bankruptcy judges in your district. If you're appearing before a judge who has been on the bench for longer than

one term (14 years) it's likely the judge has published an opinion on the issue. If not, one of the other judges in the district probably has and their opinion can be extremely persuasive to support your argument.

5. When appearing before a trustee at a 341 meeting, know your client. Section 341 of the Bankruptcy Code requires a meeting of creditors upon the filing of a petition for relief. In consumer bankruptcy cases (i.e., Chapter 7, Chapter 13) this meeting is most likely the most pivotal point of your client's case. Prepare your client thoroughly. Know everything about your client's financial affairs, from their bank accounts and gross yearly income to the watch they wear.

6. Review carefully your client's schedules and statement of financial affairs prior to filing. Careful review lessens misstatements or material omissions. The judge, the trustee, and all creditors will review and analyze their opinions of the debtor and adjust their actions in the bankruptcy court based largely upon the statements and facts contained in the debtor's Schedules and Statement of Financial Affairs. Ask for more time to file rather than doing so hurriedly and risking your client's chances for achieving a discharge or reorganization.

If you remember to follow these general tips, you should survive your next bankruptcy assignment.

Luis Martinez-Monfort is an associate with the firm of Hill, Ward & Henderson in Tampa, Florida.

READY RESOURCES

The Portable Bankruptcy Code and Rules, 2000 Edition, PC #507-0334.

Bankruptcy Deadline Checklist, 2d ed. 1966. PC #507-0300. Section of Business Law members receive a discounted price.

To order either title, call the ABA Service Center at 800/285-2221 or order online at www.ababooks.org.



Scott Lilly recently joined the Tampa office of Gray, Harris, Robinson, Shackelford, Farrior, Attorneys at Law. Scott's practice areas include bankruptcy, creditors' rights, state court litigation, and appeals.

John D. Emmanuel has been elected chair-elect of the Business Law Section of The Florida Bar. He is a shareholder with the Tampa law firm of Fowler, White, Gillen, Boggs, Villareal and Banker.

Marsha Rydberg has been elected Treasurer of The Florida Bar Council of Sections and appointed to The Florida Bar Unlicensed Practice of Law Committee.



Please contact Amanda Hill with any news concerning TBBBA members at (813) 223-7000 (phone), (813) 229-4133 (fax) or ahill@carltonfields.com.

The Lighter Side...



A secretary, an associate and a partner of a prestigious law firm are walking through a city park at lunch time and they find an antique oil lamp. They rub it and a Genie comes out in a puff of smoke.



The Genie says, "I usually only grant three wishes, so I'll give each of you just one." "Me first!" says the secretary. "I want to be in the Bahamas, driving a speedboat with Brad Pitt." Poof! She's gone. "Me next! Me next!" says the associate. "I want to be in Hawaii, relaxing on the beach with a professional hula dancer on one side and a Mai Tai on the other." Poof! He's gone. "You're next," the Genie says to the partner. The partner says, "I want those two back in the office after lunch!"

THANK YOU DOOR PRIZE SPONSORS!



Please patronize the businesses that contribute door prizes for our monthly meetings. For the September program we thank:

Don Delano of DL Jewelers

4332 El Prado
Tampa, Florida
813/835-4899

Don (member Caryl Delano's husband) donated a Seiko radio-controlled, digital alarm clock.

Clint Broussard of Lexis/Nexis Sales

813/318-9696

Clint donated a two-week subscription to all Lexis databases, including all national public records, and a Lexis T-shirt and pen.

Flowers by Mary

609 Columbia Drive
Tampa, Florida 33606
813/254-1758

Mary Morrison (association friend) donated four Fall flower arrangements.

PRACTICE POINTERS FOR LAWYERS APPEARING IN JUDGE WILLIAMSON'S COURTROOM¹



While cases will ultimately be decided on the merits, the procedural process in achieving your client's goals is something that can always benefit from more attention. My chamber's staff and I thought it would be helpful to point out to counsel some areas in which we see recurring problems. Sometimes lack of attention to these points unnecessarily slows the process down. However, in other cases, ignoring these details can affect the outcome of the particular proceeding before the court.

1. Contents of Motions

When drafting your motion, first ask yourself what the court needs to know, then include that information in the motion. For example, motions for relief from stay should include a complete description of the collateral, amount of indebtedness, nature of default (in Chapter 13's, provide a breakdown of pre- and post-petition defaults), and the amount of regular monthly payments. If a foreclosure action is pending or a foreclosure judgment has already been entered, that information should be included as well.

A motion to approve a sale or to assume a lease should provide particulars regarding the terms of the sale or lease. If the terms are not outlined in the body of the motion, then a copy of the contract or lease should be attached to the motion.

Do not combine motions that seek different relief or combine motions with objections. The governing timeframes for notices and hearings may not be consistent. For example, if you file a "Motion to Dismiss or in the Alternative, for Relief from the Automatic Stay," the clerk must decide whether to deal with the motion under the notice and service requirements of a motion to dismiss or a motion for relief, or both. Since the notice and service requirements are different, this is confusing. Keep them separate.

2. Review It Before You File It

It is clear that many counsel filing papers with the court do not review their papers in final form before filing them. They leave it up to staff. This problem is not restricted to lawyers who only appear occasionally in bankruptcy court. It occurs frequently even among the most experienced counsel. For example, papers often refer to exhibits and mailing matrices that are not attached. Where the referenced mailing matrix is not attached, papers are stricken for insufficient service, resulting in the needless expenditure of time by the clerk, court, and counsel. Oversights such as these reflect poorly on counsel.

3. Briefs

As you know, briefs are not required or even welcome in the context of routine matters that the court hears every day. On the other hand, briefs are certainly welcome when a novel or complex issue will be argued at a hearing. Alternatively, the court welcomes the filing of cases that will be relied on at the hearing so long as the cases are furnished to opposing counsel (cases may be marked up and underlined for emphasis so long as the copies provided to opposing counsel contain the identical markings).

However, when you do file briefs or cases, they are of very little use to the court unless they are filed in a timely manner so as to allow sufficient time for chambers to review them in advance of the hearing (delivery to chambers at the end of business hours on the eve of a hearing or on the day of the hearing is not timely!). You should assume that the judge will rule from the bench, and briefs or cases filed at or immediately before the hearing will not be reviewed prior to the court's making its ruling.

¹ These practice pointers are also available at Judge Williamson's eChambers on the court's website at www.flmb.uscourts.gov.

TOO BUSY TO HANDLE APPEALS?

**TRENAM, KEMKER'S APPELLATE
PRACTICE GROUP MEMBERS ARE
AVAILABLE TO ASSIST
BANKRUPTCY PRACTITIONERS
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Our members include:

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and

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Bankruptcy Judge Emeritus and Thomas E.
Baynes, Jr., Chief U.S. Bankruptcy Judge,
U.S. Bankruptcy Court, M.D. Fla.

See our website at www.trenam.com or
Call Marie Tomassi or Dawn Carapella
At (813) 223-7474

Amendment to Schedules D, E and F

*****Notice to All Attorneys Representing Debtors in the Tampa and Fort Myers Divisions*****

Effective August 1, 2001, each amendment to the debtor's Schedule D, E or F that adds creditors not previously noticed of the bankruptcy, shall include service of a copy of the Notice of Bankruptcy Case, Meeting of Creditors and Deadlines (§ 341 Meeting Notice) upon each additional creditor. In Chapter 7 cases, if a Notice Fixing the Deadline to File a Proof of Claim has been issued by the clerk's office, a copy of the notice shall be served in addition to the § 341 Meeting Notice.

Proof of service of the notice(s) must accompany the amendment. The proof of service must clearly reflect the title of the notice served and may be included in the proof of service of the amendment.

Failure to provide proof of service of the notice(s) may cause the amendment to be stricken from the record.



To make sure you receive upcoming
editions of The Cramdown and to
have your correct information in the
directory, please call
Julia Sullivan Waters
at 813/224-3604.

Julia can also furnish you with an
application for renewal of your
TBBBA membership.

4. **Courtroom Decorum**

Make your appearance at the beginning of every hearing, and announce your name clearly and proudly. Mumbling your name is not effective communication. Do not assume that everyone knows who you are, even if you appear regularly in the bankruptcy court. Speak clearly and one-at-a-time.

Be mindful that one of the courtroom deputy's functions is to record rulings. Therefore, you should not interrupt the courtroom deputy to discuss scheduling matters. Also, except in special rare circumstances, you should not ask the courtroom deputy to accept papers for filing. Papers are to be filed with the intake section of the Clerk's office on the 7th floor.

Address all remarks to the court, not to opposing counsel without leave of the court. Refer to all persons using surnames and not by their first names. Stand at the lectern when addressing the court or examining a witness.

5. **Conduct of Routine Hearings**

During stay hearings, settled matters with proposed orders will be called first; settled matters without orders will be called next; remaining matters will then be called in the order they are listed on the calendar.

When announcing settled matters, refer the judge to the page number where the case is listed on the calendar. A copy of the calendar is posted on the wall outside the courtroom, and copies are located at the counsel tables in the courtroom.

Uncontested Chapter 13 confirmation hearings will be handled by the Chapter 13 trustee prior to the entry of the judge into the courtroom. Even though the judge is not present during the trustee's announcements, please observe courtroom decorum during these hearings because the court reporter still has to record what occurs.

6. **Hearings**

Except in unusual situations, typically emergency in nature, the initial hearing on a motion will be noticed as "preliminary." If a hearing is noticed as "preliminary" the court will not permit the introduction of testimony or documentary evidence. However, if it appears from discussion with counsel that there are no material facts in dispute, the court, if otherwise appropriate, will enter dispositive rulings at the preliminary hearing. In this regard, while the court will not permit the introduction of testimony or documentary evidence at a preliminary hearing, the court will consider as part of the record affidavits that are offered without objection, uncontradicted proffers of evidence made by counsel, and judicial and evidentiary admissions made by the parties in open court or in the papers and schedules filed with the court.

The court will receive evidence at hearings that are not noticed as "preliminary." For example, if you have filed an emergency motion and want final dispositive relief, you need to make a record and bring your witnesses to testify at the hearing.

Hearings will start at the scheduled time. If you are late and your case is called before you arrive, it is likely that the motion will either be denied for failure to prosecute or granted without opposition. Do not complain to the courtroom deputy when this happens--if you have good grounds for your failure to appear at the scheduled time, you can file a motion for reconsideration.

7. **Telephonic Appearances**

Telephonic appearances are permitted under certain circumstances for attorneys who reside outside of the Tampa Division of the Middle District of Florida. The court's policy on telephonic hearings is set forth in more detail on the court's web site at www.flmb.uscourts.gov (click on Judge Williamson's name on the

(Continued from page 12)

home page).

8. **Make a Record**

Often, lawyers will come in and argue that as a matter of law they are entitled to the relief they want. That is fine if the parties stipulate to the facts. However, without such a stipulation, there is no record upon which the court can rule. (The record may consist of unopposed affidavits and proffers of evidence, admissions contained in the papers or schedules filed by a party, documentary evidence, or live testimony.)

In addition, summary judgments must be based on a record established by, for example, depositions or affidavits – not simply based on oral proffers made by counsel. See Fed. R. Bankr. P. 7056(e).

9. **Exhibits**

One of the least understood rules of local procedure relates to the handling of exhibits at evidentiary hearings. It appears that Local Rule 9070-1 remains a mystery to most lawyers appearing in bankruptcy court. It is the rare case when trial counsel, even experienced trial counsel, shows up with properly tagged exhibits and an exhibit list for the courtroom deputy, opposing counsel, the witness, and the court. To recap, you must provide:

- Exhibit tags
- Exhibit lists
- Sufficient copies (at least four -- original, copy for court, copy for opposing counsel, copy for witness)

The court experiences unnecessary delay in the conduct of its hearings when exhibits are not properly handled. In addition, where there are more than ten exhibits, they should be organized in a binder so all parties can refer to them efficiently and without confusion.

Procedures for introduction of exhibits at evidentiary hearings are set forth in more detail on the court's website at www.flmb.uscourts.gov.

It is inconvenient when an evidentiary hearing has to be interrupted so counsel can comply with the rule.

10. **Continuances**

Do not assume that a motion for continuance filed at the last minute will be granted. Be prepared for the denial of a last-minute request. If you represent the party with the burden of proof, you should be ready to go forward or suffer the consequences of being unprepared. Refer to Local Rule 5071-1 prior to filing your motion for continuance.

Remember to submit a proposed order along with your request for a continuance. Also, if it is a last-minute request, call and let the courtroom deputy know before filing the motion that you are seeking a continuance.

11. **Emergency Filings**

You can call chambers ahead of time to let the courtroom deputy know that you will be making an emergency filing. However, absent specific instructions from chambers, all filings should be made at the intake section of the Clerk's office on the 7th floor. If you deliver a motion or proposed order that needs immediate attention, tell the intake clerk that the matter is an urgent one. Also, it is a good idea to call the case manager from the telephone at the intake section to let him/her know that you have delivered something that needs immediate attention.

(Continued on page 14)

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12. **Proposed Orders**

Proposed orders are to include a full, descriptive title and are to be submitted within three days after the hearing. Include complete mailing addresses (not just names) on the service list. Refer to Local Rule 9072-1 when preparing proposed orders.

13. **Settlements**

If a settlement is concluded and appropriate paperwork is filed prior to the hearing date, the hearing will be cancelled. Otherwise, at least one party will be required to appear at the hearing to announce the terms of the settlement.

14. **Contacting Chambers, Case Managers, Court Reporter**

It is appropriate to call chambers regarding strictly scheduling or procedural matters. Calls may be directed as follows:

Scheduling Matters	Marti Malone Courtroom Deputy	813-301-5522
Procedural Matters	Angelina Lim Law Clerk	813-301-5521
Non Case-Related	Mary Maddox Judicial Assistant	813-301-5520

It is not appropriate to call chambers for legal advice or to discuss the merits of a motion. Rule 9003 of the Federal Rules of Bankruptcy Procedure prohibits such contact.

Generally, calls regarding the status of a matter should be directed to the case manager. You can get a telephone listing for the case managers from the Clerk’s office, or you can access it via the court’s web site at www.flmb.uscourts.gov (click on “judges” on the menu). However, before you call the case manager, check the docket yourself – you may be able to answer your own question. In any event, the Administrative Office of the United States Courts has issued directives that prohibit case managers from telling you what is on a docket.

If you need a transcript, you should order it from the court reporter by contacting Sandra K. Lee & Associates at 813-657-8780. You will need to provide the case number and the date and time of the hearing.



COURT ADOPTS NEW PROCEDURE FOR RETURNED MAIL

By Cheryl Thompson



Judge Baynes, as Chief Judge, recently entered an administrative order to ensure that notices are sent to their intended recipients as expeditiously as possible.

The order provides that, effective September 4, 2001, all envelopes containing notices sent by the Bankruptcy Noticing Center will bear the return address of debtor's counsel or the debtor, if pro se. If mail is returned, the attorney or the pro se debtor must re-mail the notice to the creditor's correct address and change the creditor's address on the clerk's all creditors matrix.

Envelopes that contain orders mailed by the Bankruptcy Noticing Center will continue to bear the return address of the clerk.

This new procedure has been successfully employed in many other courts. In addition to speeding up the transmittal of notices to creditors, it also alleviates a substantial burden on the clerk in dealing with returned mail.

The order can be viewed in its entirety by accessing the court's website at www.flmb.uscourts.gov/procedures.html.

(Continued from page 3)

assume that only the portraits of deceased or retired jurists are hung in federal courthouses. In fact, I challenge you to try to keep up with Judge Paskay's schedule. He currently presides over 5,408 active (as of August 31, 2001) cases in Tampa and Fort Myers and continues to edit treatises, author opinions, speak at seminars, and teach a bankruptcy course at Stetson College of Law – not to mention his frequent attendance at meetings of The Tampa Bay Bankruptcy Bar Association, the Hillsborough County Bar Association, the Bankruptcy/UCC Committee and Business Law section of The Florida Bar, and the Federal Bar Association. This work load, of course, is nothing new to a Judge who was famous (or infamous) for holding hearings on Saturdays, Sundays, and Holidays during the 1980s and 1990s.

So, when you are in the vicinity of Judge Paskay's courtroom, stop by and look up to your right as you enter the courtroom. The portrait of Judge Paskay is a gift from The Tampa Bay Bankruptcy Bar Association and the lawyers of Tampa Bay and Central and Southern Florida. We are especially grateful to Chief Judge Elizabeth Kovachevich of the District Court for her permission to place the portrait in Judge Paskay's courtroom. Although it is an inadequate tribute to his many years of service on the bench, the portrait represents a small token of the bar association's appreciation of the countless hours that Judge Paskay has devoted to the administration of justice in the bankruptcy courts in Tampa, Fort Myers, and Orlando.

Reminder!

Please make sure that you have paid your membership dues for this term. Contact Julia Sullivan Waters at 813/224-3604 if you have any questions.



The Cram Down Surfs the 'Net

By Catherine Peek McEwen

The Cram Down brings you two useful web sites and one old-fashioned resource (a book, remember what that is?) discovered through the Internet.

LexisOne(sm) – www.lexisone.com -- Free Online Research Tool and Forms

From this site, hosted by LexisNexis, you can access more than 6,000 FREE official and approved forms, as well as forms from the extensive Matthew Bender® collection -- all regularly updated and logically organized. As well, you can access FREE case law from the LEXIS® service — including U.S. Supreme Court cases from 1790 and selected federal and state cases from January 1, 1996. Another helpful offering is the site's Legal Internet Guide, which has links to 20,000 cybersites in 32 different categories and 36 different practice areas. Under the bankruptcy practice area heading, there are a number of useful links and some that are just plain intellectually stimulating. For example, deep thinkers can take Harvard Professor Elizabeth Warren's final examination in Bankruptcy Policy. The rest of us can visit the last suggested web site below.

Gateway to All 50 Secretary Of State Web Sites -- www.secst.com

This site links to web sites for the Secretaries of State in all 50 states and the District of Columbia. It also lists the web sites for the Clerks of Court in all 67 counties in Florida. Links are provided for direct access to online public records databases maintained by state and local governments. Using the 'net, it is possible in many states to access Secretary of State databases and obtain public records and other information about existing profit corporations, nonprofit corporations, partnerships, limited partnerships, limited liability companies, businesses and other legal entities, including Uniform Commercial Code (UCC) lien filings and fictitious name or trade name registrations. Some sites have forms articles of incorporation, amendments, mergers, fictitious names, trademarks, and many other filing forms. (Be careful about using forms from another state without being familiar with the laws of that state.)

Florida Causes of Action at a Glance

The *Florida Litigation Guide* is a mini-compendium

of the elements of 35 popular causes of action, accompanied by citations to the latest Florida and federal cases (within the Eleventh Circuit) on the elements. Opposite each cause of action is a similar list of defenses and related case citations. The booklet is a bargain at only \$20.00 plus tax and \$1 shipping. For those with an hourly billing rate of \$200 or more, the cost represents about “.1” of your billable hour. It will save you – and thus your client – much more than that. The booklet's author, Mark Wites, says, “No longer need young lawyers feel frustrated when requested to ‘quickly’ find the most recent Florida Supreme Court case citing the elements required to obtain a temporary injunction for a partner's emergency motion. Experienced lawyers will also benefit from the ease at which they will locate information used in daily practice.” The *Guide* was originally part of The Florida Civil Litigation Handbook, which was published by Matthew Bender. To see an excerpt from the 2001 edition go to www.wklawyers.com/Exerpt.htm. To order your copy, email or fax your name, address, and email address to MWites@wklawyers.com or call 954-428-3929.

Just for Fun

For those too timid to try Professor Warren's exam, a less stressful, more fun challenge can be found at www.boxerjam.com, a provider of interactive, online games. For example, there is “Strike A Match,” a head-to-head competition against other online players in a classic word matching game that is governed by a *very* quick clock -- sort of a live-action IQ test. Watch out, though, this game can be addictive!

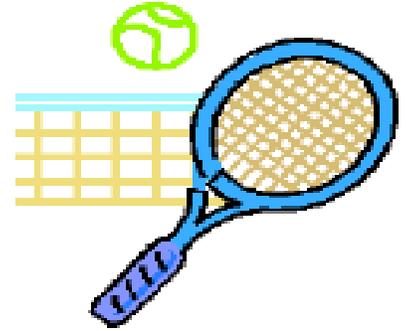


A new contract photocopy company, Judicial Research & Retrieval Services, replaced IKON on September 10, 2001.

Further information will be posted on the Court's website: www.flmb.uscourts.gov.

COME JOIN THE FUN!

**2001 TAMPA BAY BANKRUPTCY
BAR ASSOCIATION
SOCIAL TENNIS TOURNAMENT
HARBOUR ISLAND ATHLETIC CLUB
November 9, 2001**



The Tampa Bay Bankruptcy Bar Association will host a tennis tournament on November 9, 2001 at the Harbour Island Athletic Club. You do not have to be a Pete Sampras or Jennifer Capriati to participate. The tournament is open to TBBA members and their guests and its primary purpose is for people to meet outside their business confines, play tennis, and have some fun. Play will begin at 12:30 p.m. and continue until approximately 3:30 p.m. Beer and wine will be available after the tournament.

In the past, the tournament consisted of a doubles round robin format with players changing partners after each set. Depending on the turnout, it is expected that the format will remain the same. The cost is \$25.00 per person. **Please make checks payable to Tampa Bay Bankruptcy Bar Association and send them to TBBA c/o Bob Wahl, 4301 Anchor Plaza Parkway, Suite 300, Tampa, FL 33634.** If you have any questions, contact Bob Wahl at 813/289-0700 or Rob Soriano at 813/229-4230.

In order to assist the tournament directors, please complete the following questionnaire regarding your tennis experience and return it with the entry fee.



QUESTIONNAIRE

Do you have a USTA rating? If so, what is your rating? ____

If you do not have a USTA rating, do you consider yourself an A, B, or C player (circle one)?

A Player: Plays in tournaments or is a club player.

B Player: An intermediate player who can consistently hit a backhand and forehand and generally plays several times a month.

C Player: Can generally keep the ball in play but is unable to consistently hit either a backhand or forehand and makes several unforced errors during a game, or has some physical limitations.

Have you ever been a teaching tennis professional? If so, why are you practicing law?



THE OFFICERS AND DIRECTORS OF THE TAMPA BAY BANKRUPTCY BAR ASSOCIATION 2001-2002

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The Tampa Bay Bankruptcy Bar Association Committee Chairs For 2001-2002

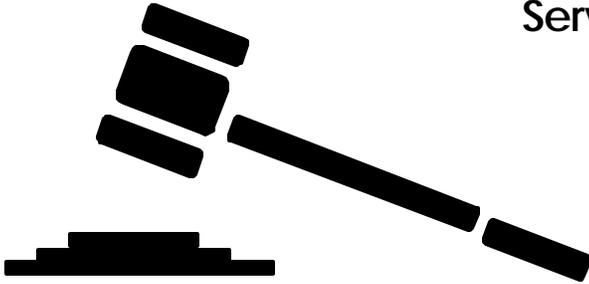
The Association is looking for volunteers to assist us this coming 2001-2002 year. If you are interested in getting more involved with the Association or one of the Standing Committees, please contact any one of the Association officers or the Chairperson(s) listed below.

<u>COMMITTEE</u>	<u>CHAIRS</u>	<u>TELEPHONE</u>	<u>FACSIMILE</u>
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**THE ASSOCIATION'S OFFICERS
AND DIRECTORS WISH ALL TBBA
MEMBERS A heart felt
HAPPY t hanksgiving!**



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